SUPREME COURT, U. S.

NOV 6 1967

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 662

ETS-HOKIN & GALVAN, INC., a Foreign Corporation,

Petitioner,

vs.

MAAS TRANSPORT, INC., a North Dakota Corporation, and B. L. LAWRENCE, doing business as LAWRENCE TRANSPORTATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

Reply Brief to Respondents' Brief in Opposition to Petition for Writ of Certiorari

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In opposing the Petition for Writ of Certiorari, the Respondents have misstated certain facts in the record and raised additional questions which require clarification.

I.

Respondents Had No Applicable Tariff on File With the Interstate Commerce Commission, and the Hauling Without Such Filed Tariff Violated the Interstate Commerce Act.

Respondents seek to distinguish the cases cited by Petitioner in its Opening Brief by arguing that (i) they involved situations where the carrier had one tariff on file with the Interstate Commerce Commission and sought to charge the shipper a different tariff whereas here there was no tariff on file with the Interstate Commerce Commission at all, (ii) Respondents are entitled to claim the benefits of an intrastate tariff on file with the North Dakota Public Service Commission and (iii) the hauls in question were not determined to be interstate in character until after they were over.

It is submitted that these distinctions should not make for a dffferent result. The opportunity for mischief is just as great, if not greater, when no tariff is on file as when a different tariff is on file than the one sought to be charged. Interstate shippers are entitled to the protection of the impartiality and expertise of the Interstate Commerce Commission independent and apart from the action of state regulatory agencies. And the time when the interstate character of the haul is determined is completely immaterial.

Respondents, at Page 7 of their Brief, imply that an effective tariff for the hauls in question was on file by November 8, 1962. The Trial Court (R. 478), the Court of Appeals, (Pet. Brief, App. "A", p. 4, Lines 1-7), and the Interstate Commerce Commission (Pet. Brief, p. 4, Fn. 1) all found to the contrary.

II.

Respondents Knew That They Were Violating the Interstate Commerce Act When They Began to Haul.

Respondents attempt to convey the impression that they innocently thought this traffic to be in intrastate commerce.

(Brief in Opposition 1-2, 4, 7, 11.) The record indicates otherwise.

John Maas, president of Respondent Maas Transport, Inc., has been in the trucking business since 1926, engaging in interstate as well as intrastate hauls. (R. 108-110). The fact that Respondent Maas applied for interstate authority three weeks *before* the hauling began[1] makes it obvious that Maas knew the haul was in interstate commerce and that Respondents were acting illegally when they began to haul without authority.

III.

A Contract Which Cannot Be Performed Without Violating a Statute Is Void and Estoppel Cannot Apply to Allow Private Parties to Circumvent Public Laws.

The authorities cited by Respondents for their proposition that Petitioner should be estopped from raising the defense of invalidity of the contract do not involve illegality of contract and are inapposite. *Union Insurance Co. v. Wilkinson,* 13 Wall. 222, 20 L.Ed. 617 (1872), dealt with the validity of an insurance policy obtained by submitting a false application. *Glus v. Brooklyn E. Dist. Term.,* 359 U.S. 231 (1959), dealt with a Federal Employers' Liability Act action to recover damages for an industrial disease brought after the statutory three year period of limitation.

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1. On August 6, 1962, Maas filed with the Interstate Commerce Commission an "Application for Motor Carrier Certificate or Permit" to "institute a new operation . . . as a common carrier by motor vehicle, in interstate or foreign commerce . . . between [railheads] on the one hand and on the other hand, [missile sites], and between such launching sites. . . ." [Pl. Ex. 7; R. 105-106].

It is well settled that a contract which cannot be performed without violation of a statute is void and estoppel cannot apply, since, if the rule were otherwise, private parties could successfully avoid the requirements of legislation enacted for the protection of the public interest. As this Court said in *Scott Paper Co. v. Marcalus Mfg. Co.*, 326 U.S. 249 at 257 (1945):

> "For no more than private contract can estoppel be the means of successfully avoiding the requirements of legislation enacted for the protection of a public interest."

The reason for the rule is stated by this Court in *Continental Wall Paper Co. v. Louis Voight & Sons Co.*, 212 U.S. 227 at 262 (1909) as follows:

> "We hold that such a judgment cannot be granted without departing from the statutory rule, long established in the jurisprudence of both this country and England, that a court will not lend its aid, in any way, to a party seeking to realize the fruits of an agreement that appears to be tainted with illegality, although the result of applying that rule may sometimes be to shield one who has got something for which, as between man and man, he ought, perhaps, to pay, but for which he is unwilling to pay.
>
> In such cases the aid of the court is denied, not for the benefit of the defendant, but because public policy demands that it should be denied without regard to the interests of individual parties."

IV.

The Record Clearly Shows That Petitioner Did Not Receive Any Money from the United States Air Force for Cable Delay and Out-of-Sequence Cable; Respondents' Assertion to the Contrary Is Untrue.

Respondents assert that Petitioner's position is devoid of equity since it "received from the United States Air

Force a large amount of money for cable delay and out-of-sequence cable." (Brief in Opposition, p. 4, p. 9, Headnote 3, p. 11.) This assertion is false.

The record is uncontradicted that the claim referred to (Claim 44) was tentatively allowed, on January 15, 1964, solely for the purpose of negotiation (P. Ex. 147, R. 359, E-266) but later was rejected by the Air Force and subsequently waived by the contractor, by Supplemental Agreement No. 23, in December, 1964. (R. 31, 359-366).[2]

V.

The Question of the Illegality of the Contract Was Raised in the Pleadings and Decided by the Trial Court.

Respondents' contention that the issue of illegality was not before the Trial Court was presented to and rejected by the Eighth Circuit. (Appellees' Brief, 22, 25-26; Appellants' Reply Brief, 3-6).

The question was raised before the Trial Court in Petitioner's Amended Answer[3], (R. 8) and Second Amended

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2. The manner in which the Air Force viewed the claim is of interest here: "Complete analysis of this claim requires one further comment. The $80,676.43 claimed by the contractor involves supposed added cost to the government for the random movement of 108 reels of cable. This breaks down into approximately $800.00 per reel. Average transportation costs for loading and shipping a reel of cable from Bonham, Texas, to Minot, North Dakota, is approximately $200.00. In other words, according to the contractor, it costs far more to randomly move a reel of cable a few miles from the vicinity of the receiving point, than it does to ship a reel of cable 1800 miles from Texas. This appears so ridiculous that we refrain from further comment." (Pl. Ex. 139; R. 370, E-250 at 251).

3. "VI. Specifically denies that Maas Transport, Inc.'s interstate tariff covered said movement and in that regard alleges that Maas' interstate tariff was illegal, invalid and void with respect to the shipments alleged in the complaints." (R. 8)

Answer[4] (R. 10); it was raised during the trial by Motion to Dismiss (R. 279), by Motion to Strike the Inapplicable Tariffs (R. 475), and by Motion for a Directed Verdict (R. 475).

CONCLUSION

For the reasons hereinabove stated Petitioner respectfully reiterates its request that this Writ be granted.

Dated at San Francisco, California on November 6, 1967.

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4. "VI. Specifically denies that Mass Transport, Inc.'s interstate tariff covered said movement, and in that regard alleges that Maas Transport's interstate tariff was illegal, invalid and void with respect to the shipments alleged in the complaints." (R. 10)